

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KIMBERLY ANGENETTE MORGAN,

Defendant-Appellant.

UNPUBLISHED

April 20, 2006

No. 259075

Genesee Circuit Court

LC No. 04-013968-FC

Before: Cooper, P.J., and Cavanagh and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony-murder, MCL 750.316(1)(b), carjacking, MCL 750.529a, kidnapping, MCL 750.349, armed robbery, MCL 750.529, assault with intent to commit murder, MCL 750.83, arson of personal property with a value greater than \$1,000, but less than \$20,000, MCL 750.74(1)(c)(i), carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. She was sentenced as a second-felony habitual offender, MCL 769.10, to life imprisonment for the murder,¹ kidnapping, armed robbery, and assault with intent to commit murder convictions, 562 to 900 months' imprisonment for the carjacking conviction, 60 to 90 months' imprisonment for the arson, carrying a concealed weapon, and felon in possession convictions, all of those sentences to be served concurrently, and a consecutive two-year prison term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant argues that the trial court erred by denying her motion to suppress her statements to the police. In considering this issue, we review the entire record de novo, but the trial court's factual findings are reviewed for clear error. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). Defendant gave statements to the police on December 22, 2003, January 4, 2004, and January 5, 2004. Her argument principally involves the events at the December 22, 2003, interrogation.

It is undisputed that defendant requested an attorney on December 22, 2003, after she was advised of her rights. Defendant subsequently gave a statement and now argues that this

¹ The judgment of sentence states that the sentences for first-degree premeditated murder and first-degree felony murder "are merged as one offense."

statement was inadmissible because it was procured after she was questioned without an attorney present. The right to counsel is guaranteed by both the Fifth and Sixth Amendments to the United States Constitution, as well as Const 1963, art 1, §§ 17 and 20. *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004). Once an accused invokes his right to counsel, there can be no further interrogation without counsel present unless the accused initiates further communication with the police. *People v McRae*, 469 Mich 704, 715-716; 678 NW2d 425 (2004). Whether a defendant voluntarily, knowingly, and intelligently waived his Sixth Amendment right to counsel by initiating communications with the police depends on the particular circumstances, including the defendant's background, experience, and conduct. *People v McElhaney*, 215 Mich App 269, 274; 545 NW2d 18 (1996).

The record indicates that after defendant invoked her right to an attorney, the questioning detective stopped the interview and immediately attempted to obtain counsel for defendant. Because an attorney was not immediately available, the detective advised defendant that "it would be some time" before an attorney arrived. We reject defendant's contention that the detective deliberately misled her into believing that it would be a long time before she would be able to see an attorney. The detective simply informed defendant that an attorney was not immediately available and she would have to wait. Defendant, without any prompting, decided that she did not want to wait for an attorney and wanted to speak to the police instead. The trial court did not clearly err in finding that defendant initiated further communications with the police and voluntarily waived her right to have an attorney present.

Defendant also asserts that her statements were involuntary because of several statements made by the questioning detective. To determine whether a confession was voluntary, the trial court must consider the totality of circumstances to ensure that the confession was "the product of an essentially free and unconstrained choice by its maker or whether the accused's will has been overborne and his capacity for self-determination critically impaired." *People v Geno*, 261 Mich App 624, 628; 683 NW2d 687 (2004) (citation and internal quotations omitted).

During the interrogation, the detective advised defendant of the nature of the charges, explained that they could be brought in either state or federal court, and explained that if defendant was charged with two federal counts, the federal prosecutor would have to review the case for the death penalty. The detective also told defendant that if she did not cooperate, he would have to tell the federal authorities that she deserved to die. The trial court found that the detective was only advising defendant of the possible penalties before her. Even if the detective's latter statement went beyond mere factual advice, we nonetheless conclude that defendant's statement was voluntary. The testimony at the *Walker*² hearing discloses that defendant did not implicate herself during that interview to any greater degree after the comment was made than she had before it was made. Because the circumstances show that defendant's December 22, 2003, statement was not affected by the detective's comment, the trial court did not clearly err in finding that it was voluntarily given. Therefore, defendant's subsequent statements were not the fruit of the poisonous tree and were likewise properly admitted.

² *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

Defendant next argues that the trial court erred by allowing the prosecutor to impeach her with evidence of her prior felony conviction for bank robbery under MRE 609. We agree. This Court reviews for an abuse of discretion the trial court's decision regarding whether a prior conviction may be used to impeach a witness. *People v Smith*, 456 Mich 543, 549-550; 581 NW2d 654 (1998). However, reversal is required only if the error was prejudicial. *People v Mateo*, 453 Mich 203, 210, 212; 551 NW2d 891 (1996). An evidentiary error does not require reversal unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

MRE 609 prohibits evidence that a witness was convicted of a crime for the purpose of attacking the witness' credibility, unless the crime contained an element of dishonesty, false statement, or theft, was punishable by imprisonment for more than one year, the trial court determines that the evidence has significant probative value on the issue of credibility, and, where the witness is a defendant in a criminal trial, the trial court also determines that the probative value of the evidence outweighs its prejudicial effect. MRE 609(a). Defendant does not dispute that her bank robbery conviction contains an element of theft and was punishable by imprisonment for more than one year.

As defendant argues, however, the trial court failed to weigh the conviction's probative value versus its prejudicial effect. MRE 609(b) provides:

For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor.

The trial court explained that it would admit the prior conviction because "[t]heft involves an argument of dishonesty, bank robbery is theft, therefore [the conviction] qualifies" for impeachment purposes. But the court never conducted an analysis on the record of the conviction's probative value or prejudicial effect, as required by MRE 609(b).³

However, defendant has the burden of demonstrating that the trial court's error was not harmless, i.e., that she was prejudiced by the error. *Mateo, supra*. Here, defendant asserts that the trial court failed to exercise its discretion, but advances no argument explaining how she was prejudiced by the admission of the prior conviction. It is apparent that the trial court's ruling did not dissuade defendant from testifying, and the reference to defendant's bank robbery conviction

³ In determining the probative value of a conviction, a trial court should consider the degree to which the crime is indicative of veracity and the age of the conviction. *People v Allen*, 429 Mich 558, 605-606; 420 NW2d 499 (1988). In determining the prejudicial effect of the conviction, the court should consider the similarity of the prior crime to the charged offense and the risk that the defendant will not testify if the conviction is admitted in light of the importance of the defendant's testimony. *Id.* at 606.

was limited to a brief admission by defendant on direct examination. The prosecutor never mentioned the conviction. In this circumstance, it is not more probable than not that the error affected the verdict. *Lukity, supra*; see, also, *People v Dyson*, 106 Mich App 90, 99 n 1; 307 NW2d 739 (1981).

Affirmed.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald